BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD BOTTOMS Claimant VS. **SKYLINE CORPORATION** Respondent AND **CNA** Insurance Carrier	)	Docket No. 202,762

ORDER

Claimant appeals from a Preliminary Hearing Order dated October 2, 1995, wherein Special Administrative Law Judge John M. Russell denied claimant benefits finding claimant had failed in his burden of proving notice of accidental injury on the dates alleged.

ISSUES

(1) Whether claimant provided notice to the respondent of an injury occurring on or about January 30, 1995, through and including May 16, 1995.

At regular hearing respondent also denied that claimant suffered accidental injury and that claimant's accidental injury arose out of and in the course of his employment. These issues were not addressed by the Special Administrative Law Judge in the Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The above-enumerated issue is listed in K.S.A. 44-534a as appealable from a preliminary hearing and, thus, this matter is properly before the Appeals Board.

Claimant alleged that while working on January 30, 1995, he slipped and fell while working for respondent. The slip and fall was observed by Mr. Frank Hiebert, supervisor in the respondent's Metal Department. Mr. Hiebert inquired of claimant on the date of the slip and fall whether he suffered injury and claimant gave no indication he had suffered an injury at that time.

It should be noted claimant had suffered an automobile accident several years earlier and had undergone a fusion and discectomy at C5-6. The surgery was performed by Dr. Ozanne.

Claimant, while talking with his wife later at home, turned his head and felt a "pop" in his neck, with a sudden onset of pain. Claimant testified the pain level subsequent to this "pop" was far worse than anything he experienced at work. Claimant was taken off work approximately February 1, 1995 and remained off work until March 27, 1995. Claimant continued working for respondent until an incident on May 15, 1995 when he passed out in the parking lot. Claimant alleged that at that time he was suffering from severe headaches resulting from a combination of the heat and his ongoing neck problems. Claimant worked part time May 16 and 17, and left work, alleging an inability to perform his work duties subsequent to that date. On May 15, the day claimant passed out, he advised Mr. Gary Reser, production manager with the respondent, that he may have strained too hard at work a few weeks earlier but that the problem may also have stemmed from the automobile accident. In a conversation between Mr. Reser and claimant on May 18, claimant reiterated that he felt this problem probably resulted from the automobile accident.

Claimant's co-workers and supervisors verified that claimant regularly voiced numerous ongoing complaints as a result of the automobile accident and that hearing claimant complain about neck and head pain was not unusual.

Claimant has filed an E-1 alleging injury to his C6-7 cervical disc, with an injury date of January 30, 1995 and each and every working day thereafter, until May 16, 1995. Respondent has denied claimant suffered an accident, denied claimant's accident arose out of and in the course of his employment and denied claimant provided notice per K.S.A. 44-520.

K.S.A. 44-520 states in part:

> "Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary."

In order to decide whether claimant properly provided notice of the accident to the respondent, the Board must consider the injury dates alleged by claimant. Claimant first alleges injury on January 30, 1995, at which time he suffered a slip and fall. It is clear from the record that respondent's duly authorized agent, Mr. Frank Hiebert, was aware that claimant suffered a fall at that time. The question then becomes whether Mr. Hiebert was aware that claimant had suffered any type of injury on that date. However, a review of the language of the statute does not elicit a requirement that respondent be aware claimant suffered an injury, but merely have actual knowledge of "the accident." Claimant has satisfied this element of notice as respondent, while being unaware of any specific injury, was most certainly aware claimant had suffered an accident on January 30, 1995.

Claimant has next alleged a series of micro-traumas each and every working day through May 16, 1995. Again, we must look to the language of the statute to see if the specific statutory requirements have been met. When claimant passed out in the parking lot on or about May 15, 1995, he advised Mr. Reser, one of his supervisors, that he felt his problem may, in part, have stemmed from the problem which occurred on January 30, 1995. While claimant later changed his mind, believing the problem more than

likely occurred as a result of the automobile accident suffered in a nonwork-related incident several years before, it is uncontradicted that respondent was again advised of claimant's potential claim.

The case remains clouded when reviewing the medical records provided. Claimant was examined and/or treated by both Dr. Ozanne and Dr. Paul Stein. The medical records do not specifically discuss a fall on or about January 30, 1995, but do discuss claimant's work, with the indication that claimant had a particularly hard day on January 30, 1995. While there are some discrepancies associated with claimant's testimony, the medical evidence does, nevertheless, establish a connection between claimant's problems and the incident occurring on January 30, 1995.

The doctors apparently considered the incident or incidents at work significant, as both Dr. Ozanne and Dr. Stein state that the demanding nature of claimant's work would create an aggravation of his pre-existing condition. Dr. Ozanne felt the injury would play a role in the current picture although he found it difficult to assign a percentage of responsibility to the work injury versus the nonwork-related automobile accident and incident at home. Dr. Stein felt the factor of claimant's work to be significant.

While the evidence is unclear as to exactly what the doctors were told regarding claimant's specific labor requirements, the medical evidence is uncontradicted that there existed some work aggravation related to claimant's ongoing symptomatology.

In reviewing the entire file, including the testimony of the claimant, the various representatives of the respondent and the medical records provided, the Appeals Board finds that the respondent had actual knowledge of an “accident” occurring on January 30, 1995. The Appeals Board also finds that, as claimant is alleging a series of micro-traumas through May 16, 1995, and claimant advised respondent on or about that date of a connection between his ongoing symptomatology and the January 30, 1995 fall that claimant has provided notice of additional aggravation through May 16, 1995 within ten (10) days of the alleged injury accident. This, coupled with the medical evidence presented from Dr. Ozanne and Dr. Stein, that claimant's condition was aggravated by his work, convinces the Appeals Board that the Order of Special Administrative Law Judge John M. Russell, dated October 2, 1995 should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Special Administrative Law Judge John M. Russell dated October 2, 1995 should be, and is hereby, reversed and this matter is remanded back to the Special Administrative Law Judge for further proceedings consistent with this Order.

IT IS SO ORDERED.

Dated this ____ day of December 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeffery R. Brewer, Wichita, Kansas
D. Steven Marsh, Wichita, Kansas
John M. Russell, Special Administrative Law Judge
Philip S. Harness, Director